(640)

Nos. 06-84, 06-100

IN THE

# Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
*Petitioners*,

v.

CHARLES BURR, ET AL.,
*Respondents*.

GEICO GENERAL INSURANCE COMPANY, ET AL.,
*Petitioners*,

v.

AJENE EDO,
*Respondent*.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF FOR FARMERS INSURANCE COMPANY OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION ADDRESSED BY AMICI

Like other insurance companies, *amici* face a wave of nationwide class action litigation by private plaintiffs alleging "willful" violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA) and seeking to obtain aggregated "statutory" damages. In this brief, *amici* will address the following question:

Whether the Court should adopt objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness. Specifically, *amici* propose that an insurance company may not be held liable for a "willful" violation of the FCRA if it: (1) acts in compliance with the requirements expressly set forth in the statute and in the sample notice formally adopted by the responsible federal agency, even if it does not strictly comply with subsequently adopted, judicially-created requirements; or (2) relies in good faith on the advice of counsel on statutory issues of first impression.

## TABLE OF CONTENTS

INTEREST OF AMICI CURIAE .....1

SUMMARY OF ARGUMENT .....2

ARGUMENT .....3

I. An Insurer Cannot Willfully Violate The FCRA By Acting In Compliance With The Requirements Expressly Set Forth In The Statute And Formal FTC Guidance .....4

II. Good Faith Reliance On The Advice Of Counsel Is A Defense To A Charge Of Willfully Violating The FCRA .....16

CONCLUSION .....19

## TABLE OF AUTHORITIES

### CASES

*A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328 (D.C. Cir. 2002) ..... 10

*Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254 (D.C. Cir. 2003) ..... 10

*Ashby v. Farmers Ins. Co. of Or.*, No. 01-1446, 2004 U.S. Dist. LEXIS 21060 (D. Or. Oct. 7, 2004) ..... 1, 5, 6

*Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. (D. Or. Feb. 28, 2006) ..... 16, 17

*Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. (D. Or. Jan. 17, 2006) ..... 2

*Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. (D. Or. Oct. 30, 2006) ..... 16

*Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. (D. Or. Sept. 9, 2005) ..... 2

*Bouie v. City of Columbia*, 378 U.S. 347 (1964) ..... 15

*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... 6

*Cook v. United States*, 855 F.2d 848 (Fed. Cir. 1988) ..... 10

*Duncan v. Walker*, 533 U.S. 167 (2001) ..... 8

*Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110 (2d Cir. 1986) ..... 13

*Flores v. Carnival Cruise Lines*, 47 F.3d 1120 (11th Cir. 1995) ..... 12

*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) ..... 14

*Grayned v. City of Rockford*, 408 U.S. 104 (1972) ..... 14

*Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986) ..... 12

*In re Farmers Ins. Co. FCRA Litig.*, No. 03-158, 2006 U.S. Dist. LEXIS 27290 (W.D. Okla. Apr. 13, 2006) ..... 1, 4

*Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244 (1994) ..... 15

*Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) ..... 15

*Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242 (10th Cir. 1999) ..... 9

*McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) ..... 18

*McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039 (7th Cir. 1989) ..... 11

*Menton v. Experian Corp.*, No. 02-4687, 2003 WL 21692820 (S.D.N.Y. July 21, 2003) ..... 12

*Murray v. New Cingular Wireless Servs., Inc.*, 432 F. Supp. 2d 788 (N.D. Ill. 2006) ..... 12

*Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d Cir. 1994) ..... 12

*Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d 1081 (9th Cir. 2006) ..... passim

*Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) ..... 11

*Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995) ..... 11

*Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915) ..... 13

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ..... 13

*Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) ... 11, 12

*Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) ... 16, 18

*United States v. Halper*, 490 U.S. 435 (1989) ... 13

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ... 6

*Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985) ... 12

**STATUTES**

15 U.S.C. § 1681 ... i, 1, 9

15 U.S.C. § 1681a ... 2, 4

15 U.S.C. § 1681e ... 5, 6

15 U.S.C. § 1681j ... 8

15 U.S.C. § 1681m ... passim

15 U.S.C. § 1681n ... 3

15 U.S.C. § 1681o ... 3

**OTHER AUTHORITIES**

12 C.F.R. § 202.9 ... 9

15 C.F.R. pt. 601, App. C ... 6, 15

16 C.F.R. § 601.2 ... 6

16 C.F.R. pt. 600 App. ... 9

W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36 (5th ed. 1984) ... 11

## BRIEF OF FARMERS INSURANCE CO. OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF AMICI CURIAE[1]

*Amici Curiae* Farmers Insurance Company of Oregon, Inc., Farmers Group, Inc., and several of their affiliates (Farmers) are defendants in many nationwide class actions pending in federal courts throughout the country alleging violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA). *See, e.g., In re Farmers Ins. Co. FCRA Litig.*, No. 03-158, 2006 U.S. Dist. LEXIS 27290 (W.D. Okla. Apr. 13, 2006) (consolidated MDL proceeding); *Ashby v. Farmers Ins. Co. of Or.*, No. 01-1446, 2004 U.S. Dist. LEXIS 21060 (D. Or. Oct. 7, 2004) (Brown, J.). In each of these actions plaintiffs do not claim any actual injury or compensable loss.

Like petitioners and the other insurance company *amici*, Farmers is directly affected by the pernicious effects of the Ninth Circuit's expansive ruling in *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d 1081 (9th Cir. 2006). Farmers provided to its insureds FCRA notices that tracked exactly the content requirements of the statute and the sample notice promulgated by the Federal Trade Commission. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8. In light of the issues of first impression arising from application of the FCRA notice requirements to the insurance industry's use of credit information for risk-based pricing, Farmers obtained legal ad-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

vice from knowledgeable counsel with expertise on FCRA issues. *See Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Sept. 9, 2005); *id.*, slip op. at 2-3 (D. Or. Jan. 17, 2006). Yet despite these good faith efforts to comply, Farmers faces claims for several billions of dollars in aggregated statutory damages for alleged "willful" violations of the FCRA.

## SUMMARY OF ARGUMENT

The Court has granted certiorari to determine whether the Ninth Circuit erred in holding that petitioners may be liable for "willfully" violating the FCRA. In this case, the Ninth Circuit interpreted the phrase "increase in any charge for . . . insurance" in the definition of "adverse action" (15 U.S.C. § 1681a(k)(1)(B)(i)) – the trigger requiring insurers to provide notices under the FCRA – to require insurers to send notices to consumers who received *discounts* on their insurance policies. The panel then imposed additional content requirements for these notices above and beyond those enumerated by the legislative and executive branches. It further compounded these errors by holding that the failure to abide by these new, judicially-created requirements may be a "willful" violation of the FCRA deserving of a potentially annihilating monetary sanction. There is no basis in the text of the statute, legislative history, or judicial precedent for these expansive interpretations.

In this brief, Farmers will propose two objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness.

*First*, where an insurance company complies with the requirements expressly set forth in the statute and the sample notice formally adopted by the responsible federal agency, a court's *post hoc* decision to add extra-statutory notice requirements cannot be the basis for a finding of willfulness.

*Second*, an insurer's reliance on the advice of counsel in formulating its FCRA policies also precludes a finding of willfulness.

Either one of these factors alone negates the requisite state of mind to hold the defendant liable for statutory or punitive damages. Taken together, the factors demonstrate conclusively that a company acted in good faith and cannot be held liable for "willful" noncompliance with the FCRA.

## ARGUMENT

As petitioners' briefs establish, "willfulness" requires a "knowing" disregard of the law, and not the lesser standard approximating gross negligence adopted by the Ninth Circuit. GEICO Pet. 22-24; Safeco Br. 17-37. Congress enacted a two-tiered standard for civil liability in the FCRA: A plaintiff may obtain actual damages on a showing of a "negligent" violation of the FCRA, *see* 15 U.S.C. § 1681o(a)(1), while punitive and statutory damages are available only on the higher showing of "willful" noncompliance. *Id.* § 1681n(a). It is axiomatic that a defendant must know what the law requires before being held liable for "willfully" violating that law. In its decision, however, the Ninth Circuit imposed a broad definition of "increase in any charge for . . . insurance" in the definition of "adverse action," and it also imposed new content requirements for FCRA notices that are nowhere to be found in the statute itself. *Reynolds*, 435 F.3d at 1094-95. Indeed, the court did not even purport to provide an "exhaustive" list of the content requirements, thereby leaving insurers in peril of a subsequent expansion of the list. *Id.* at 1085 n.2, 1095 n.14.

In light of the tremendous uncertainty posed by the Ninth Circuit's decision, under which an insurer's failure to comply with requirements that are announced *post hoc* by a federal court may lead to liability in private litigation, Farmers respectfully submits that the Court should articulate objective guideposts to which insurers can conform their FCRA policies and avoid a finding of willfulness. Farmers focuses on

two such criteria: compliance with the specific content requirements of the statute and formally promulgated FTC guidance; and reliance on the advice of counsel.

## I. An Insurer Cannot Willfully Violate The FCRA By Acting In Compliance With The Requirements Expressly Set Forth In The Statute And Formal FTC Guidance

When an insurance company takes an "adverse action," which action is defined to include an "increase in any charge for . . . insurance," the FCRA requires that the insurer send the consumer a notice. 15 U.S.C. § 1681a(k)(1)(B)(i), § 1681m(a). The Ninth Circuit's decision interpreted these terms in an expansive manner that is not supported by the text of the statute or the legislative history. The court further erred by engrafting additional content requirements for "adverse action" notices beyond the discrete list set forth in Section 1681m(a)(1)-(3).

Farmers agrees with petitioners and other *amici* that charging anything less than the best possible rate is *not* an "increase in any charge for . . . insurance" constituting an "adverse action" that requires a notice under the FCRA, as the Ninth Circuit held. *See Reynolds*, 435 F.3d at 1093. Nonetheless, Farmers conservatively opted to issue "adverse action" notices to all insureds that informed them of the "action" (their premium, based in part on consumer information) and who did not receive the most favorable premium discount based in whole or in part on information contained in a consumer report. *In re Farmers Ins. Co.*, 2006 U.S. Dist. LEXIS 27290, at *9 n.4, 26 n.10.

The notices that Farmers sent, to a very broad group of insureds, included all of the content specified in the FCRA and in the sample notices formally promulgated by the FTC. But because the notices stopped short of affirmatively *characterizing* Farmers' pricing as "unfavorable" or "adverse," private plaintiffs have sued Farmers in federal courts across the country. Compliance with the express statutory and ad-

ministrative notice requirements, however, should preclude a finding of willfulness notwithstanding any additional requirements that might later be imposed by a federal court, including those that the Ninth Circuit erroneously adopted.

1. The FCRA provision at issue in these cases includes a discrete list of the required content for "adverse action" notices: (1) the adverse action (i.e., the premium, based in part on consumer information); (2) the name and contact information for the consumer reporting agency that furnished the report; (3) a statement that the reporting agency did not take the action and cannot explain the specific reasons for it; and (4) a notice of the consumer's rights to obtain a free copy of the report and to dispute the accuracy or completeness of this information. 15 U.S.C. § 1681m(a)(1)-(3). Farmers' notice contained all of this content. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

In its 1996 amendments to the FCRA, Congress directed the FTC to prescribe the required content of notices setting forth users' responsibilities and to promulgate a sample notice. *See* 15 U.S.C. § 1681e(d)(2) ("The Federal Trade Commission shall prescribe the content of notices . . . ."). Pursuant to this express statutory delegation, and after notice and an opportunity for comment, the FTC promulgated the following "Notice of Rights and Duties Under the Fair Credit Reporting Act":

> **Adverse Actions Based on Information Obtained From a [Consumer Reporting Agency ("CRA")]**
>
> If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required by Section 615(a) of the FCRA [15 U.S.C. § 1681m(a)] to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:
>
> - The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.

- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer requests the report within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

15 C.F.R. pt. 601, App. C (62 Fed. Reg. 35,595, 35,596-97 (July 1, 1997); 69 Fed. Reg. 69,776, 69,798 (Nov. 30, 2004)). Once again, Farmers' notice contained all of this required information. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

Congress specifically directed that "a consumer reporting agency *shall be in compliance* with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph." 15 U.S.C. § 1681e(d)(2) (emphasis added). *See also* 16 C.F.R. § 601.2 (providing that a consumer reporting agency that sends Appendix C is in compliance with its duties under 15 U.S.C. § 1681e(d) and § 1681g(c)).[2]

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[2] The FTC's sample notice is entitled to judicial deference because "Congress delegated authority to the agency generally to make rules carrying the force of law, and that . . . interpretation . . . was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *See also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Yet, remarkably, the Ninth Circuit considered the text sufficiently "clear" and "unambiguous" to support a ruling "independent[] of" and without the need to "defer to" the FTC's interpretation. *Reynolds*, 435 F.3d at 1092 & n.9 ("As the statute's text

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2. Without citing or considering the FTC's sample notice, the Ninth Circuit extended insurers' obligations well beyond these specific statutory and regulatory provisions and read several new content requirements into the statute. Under *Reynolds*, insurance companies now must also: (1) "describe the [adverse] action"; (2) "specify the effect of the action upon the consumer"; (3) "identify the party or parties to the action"; (4) "inform[] [the consumer] that his rate for insurance was increased because of information in his credit report" even if his rate is lower than it had been prior to consideration of credit report information; and (5) if a "family" of "affiliated companies [are] responsible for taking an adverse action," the insurer must "identif[y] those companies and their respective roles." *Reynolds*, 435 F.3d at 1084-85, 1094-95, 1096. Further, the Ninth Circuit made clear that it might add still additional – but presently unspecified – requirements in the future.[3]

The Ninth Circuit thus effectively rewrote the statutory language from "notice *of the* adverse action" (15 U.S.C. § 1681m(a)(1)) to "notice *that the action taken was adverse*" or "notice *why the action taken was adverse*." After acknowledging that "notice of the adverse action" was an undefined term in the FCRA, the Ninth Circuit panel engrafted new requirements that such a notice must contain. "[A]t a minimum," the court held, these notices must include more

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is clear, we need not resort to either the agency's interpretations or the statute's legislative history.").

[3] The panel stated, "[w]e do not decide whether a fuller description of what specific information was adverse is required as this question is not before us." *Id.* at 1094 n.14. *See also id.* at 1085 n.2 ("We do not intend this list to be exhaustive."). Thus, the panel's decision is an invitation to private plaintiffs and the lower courts to hold insurance companies liable for "willful" noncompliance because they are unable to predict additional content requirements that may later be divined by the federal courts.

than the content requirements specified in Section 1681m(a)(2), and the insurer must, *inter alia*, "*describe* [and] . . . specify the effect of the action upon the consumer . . . ." *Reynolds*, 435 F.3d at 1094-95 (emphasis added).

The mere fact that Congress did not separately define "notice of the adverse action" is not a license for the courts to rewrite that phrase to impose additional obligations upon insurers. In fact, Congressional silence in this particular situation means just the opposite. Section 1681m(a), the notice provision at issue in these cases, stands in stark contrast to other provisions in the FCRA and related consumer protection statutes in which Congress expressly requires a characterization of the actions taken. For example, Section 1681j(b) states that a consumer is entitled to a free credit report "after receipt by such consumer of a notification pursuant to section 1681m of this title, or of a notification from a debt collection agency affiliated with that consumer reporting agency *stating that the consumer's credit rating may be or has been adversely affected*." 15 U.S.C. § 1681j(b) (emphasis added).

Here, Congress drew a distinction between a Section 1681m notification and a Section 1681j debt collection agency notification – and only the latter must contain a statement characterizing the action taken. This Court has explained the rule as "well settled" that the inclusion of particular language in one section of a statute, and the omission of that same language in another section, creates a general presumption "that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (internal citations omitted). The Ninth Circuit's decision flies in the face of that rule and is inconsistent with the structure of the statute.

The Ninth Circuit's reading also contravenes formal guidance from the FTC, the agency responsible for enforcing the FCRA against insurers. The FTC has published Commentary that is a "guideline intended to clarify how the

[FTC] will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history." 16 C.F.R. pt. 600 App. (Introduction ¶ 1). This Commentary clarifies that a user is not required to characterize or otherwise describe the action taken on the basis of consumer information: "Creditors should not confuse compliance with *section [1681m(a)], which only requires disclosure of the name and address of the consumer reporting agency*, and compliance with the Equal Credit Opportunity Act [ECOA], *. . . which require[s] disclosure of the reasons for adverse action*." *Id.* *See* 12 C.F.R. § 202.9(b)(2) (requiring "statement of reasons for adverse action" for ECOA notices).[4]

Thus, neither Congress nor the responsible executive-branch agency has required insurers to characterize their pricing decisions as "unfavorable" – and for good reason: Characterizing FCRA notices as the Ninth Circuit has required would mislead a large number of consumers who received a benefit from the consultation of consumer information. Because many of these consumers received discounts, describing that favorable result as somehow "unfavorable" would confuse consumers and defeat the goal of the FCRA to provide accurate information. *See generally* 15 U.S.C. § 1681 (congressional findings); *Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242, 1245 (10th Cir. 1999) ("The purpose of FCRA is to ensure accuracy and fairness in credit reporting and to require that such reporting is confidential, accurate, relevant, and proper.").

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[4] *See also* Official Staff Commentary to Regulation B, 12 C.F.R. pt. 202, cmt. 202.9(b)(2)-9 ("The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or from its own files.").

Farmers and other insurers should not be penalized for complying with the specific content requirements of the statute itself. But most certainly these insurers cannot "willfully" violate the statute based on the Ninth Circuit's freshly-minted content addenda.

3. As a matter of law, providing an "adverse action" notice that contains the requisite content specified by Congress and the FTC cannot constitute "willful" noncompliance. *Amici* are aware of no case in which compliance with an agency standard has been ruled a willful violation of the statute addressed by the standard. Instead, federal appellate decisions in analogous circumstances hold that the opposite is true, that compliance with agency interpretations disproves "willfulness."

As one court has explained, a defendant's good faith compliance with agency standards negates a finding of willfulness: "A company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, . . . or if it made a good faith effort to comply with a standard . . . ." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (citations omitted). *See also Cook v. United States*, 855 F.2d 848, 850 (Fed. Cir. 1988) (declaring *per se* rule that the federal agency's reliance in good faith on the Secretary of Labor's advice disproved a "willful" violation of the Fair Labor Standards Act).[5]

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[5] Other decisions confirm that good faith efforts to comply with regulatory standards cannot support a finding of a "willful" violation of regulations. *Accord A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("A good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness.") (quoting *Sec'y of Labor v. Keco Indus.*, No. 81-263, 1987 WL 89096, at *11 (O.S.H.R.C. Mar. 27, 1987); *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th

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Indeed, numerous courts have held that compliance with government standards is so plainly inconsistent with a finding of malice or conscious wrongdoing that it bars the imposition of punitive damages altogether. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (punitive damage award barred in part because no government agency had ever required certain design feature); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

An insurer's ability to rely on the plain language of the statute is particularly important where, as here, it has not been subject to extensive prior construction. For example, in *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993), the Fifth Circuit considered whether the defendant willfully violated the provision of the FCRA now contained in 15 U.S.C. § 1681m(d)(1), which requires that written solicitations contain a "clear and conspicuous" disclosure of certain information. The court held that the defendants' conduct was not "willful" because there was no legal authority, either in the statute or from the FTC, articulating just how conspicuous the required FCRA notice must be. *Id.* at 294-96 ("There was no prior guidance to suggest that TRW's notice was insufficient, and we cannot conclude that TRW knowingly and intentionally obscured the notice in conscious disregard of consumers' rights."). The court reversed the award of puni-

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Cir. 1989) ("A violation is not willful when it is based on a non-frivolous interpretation of [an agency's] regulations.").

tive damages on the ground that the defendants' conduct was not willful. *Id.* at 296.[6]

4. Permitting a court to find a willful violation based on an interpretation of the FCRA requiring content beyond that expressly set forth in the applicable statute and FTC's formally promulgated sample notice – especially in the absence of any prior, settled judicial, administrative, or industry construction to the contrary – would raise serious due process issues.

A finding of willfulness subjects the defendant to potentially massive statutory and punitive damages.[7] This Court

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[6] *Accord Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (affirming dismissal of claim alleging willful violation of law "[b]ecause this is a case of first impression"); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994) (refusing to find defendants liable for a "willful" violation of the FLSA in a "case of first impression" because the defendants "did not in any way thwart settled FLSA doctrine"); *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (finding no willful violation because "case law was split at that time"); *Murray v. New Cingular Wireless Servs., Inc.*, 432 F. Supp. 2d 788, 794 (N.D. Ill. 2006) (holding that defendant's notice violated the "clear and conspicuous" requirement of the FCRA, but that this violation was not "willful" because there was insufficient guidance for defendant); *Menton v. Experian Corp.*, No. 02-4687, 2003 WL 21692820, at *4 (S.D.N.Y. July 21, 2003) (refusing to hold defendant liable for "willful" violation of the FCRA based on the fact that it "narrowly construed" an "undefined" statutory term and defendant acted without "the benefit of prior court decisions addressing this issue"); *Hearst Corp. v. Stark*, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (no finding of willful copyright infringement as a matter of law when wrongfulness of defendant's action depended on unsettled question of law).

[7] Whether denominated "statutory" or "punitive," damages awarded that go beyond compensation for actual injury are punitive-in-fact. *See, e.g., United States v. Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson v. United States*,

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has repeatedly "admonished" that such civil punishment "pose[s] an acute danger of arbitrary deprivation of property," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)), and it has emphasized that "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'" *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). The Ninth Circuit's approach, however, contravenes these fundamental principles.

By subjecting a defendant to potentially enormous punishment even if the defendant reasonably and in good faith adheres to the statute's express terms, complies with the FTC's formally promulgated notice, and seeks the advice of counsel, the Ninth Circuit's interpretation deprives defendants of all objective referents to guide their conduct, creating enormous vagueness problems and inviting arbitrary and discriminatory enforcement. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" *even assuming* that defendant "should have

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522 U.S. 93, 101 (1997) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."); *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) ("[S]tatutory damages serve two purposes – compensatory and punitive."). Accordingly, these damages implicate the same due process concerns. *See Halper*, 490 U.S. at 448 ("'[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.'") (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)).

known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). *See also Amicus* Br. of Ford Motor Co. 4-10.

The Ninth Circuit's interpretation would permit massive punishment based merely upon the after-the fact determination that the defendant had acted pursuant to legal interpretations that are "creative but unlikely," not "tenable," "implausible," the product of "creative lawyering," "indefensible," or "unreasonab[ly] . . . erroneous." *Reynolds*, 435 F.3d at 1099. But such amorphous characterizations are not standards at all, and "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The Ninth Circuit's interpretation would render the FCRA just as unconstitutionally vague as the Pennsylvania statute at issue in *Giaccio*, which this Court struck down because it had been judicially interpreted to authorize juries to impose, and courts to set, costs of prosecutions on an acquitted defendant "if they [found] that his conduct, though not unlawful, [was] 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.'" *Id.* at 403-04 (citations omitted).

Indeed, because the FCRA is apparently clear on its face, allowing the imposition of statutory or punitive damages based on the Ninth Circuit's retroactive application of its new interpretation to pending cases would represent a particularly

egregious deprivation of due process. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (there is an even "potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation"); *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question.").

Consequently, this Court should reject the Ninth Circuit's interpretation of the FCRA in order to avoid, rather than create, constitutional conflicts. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

5. An application of these principles compels a reversal of the Ninth Circuit's decision. The court's expanded definition of "adverse action" to include charging anything less than the best possible rate is found nowhere in the text of the statute or its legislative history. *See* GEICO Pet. 26-28. But even if the federal courts are to infer such a requirement, certainly the petitioners are not "willfully" liable for failing to anticipate that ruling.

Moreover, when an insurer (such as Farmers) sends a notice to a broader group of customers, that insurer may not be held "willfully" liable for failing to predict judicially-created content requirements above and beyond the discrete list explicitly set forth in the statute (15 U.S.C. § 1681m(a)(1)-(3)) and in the FTC's sample notice (15 C.F.R. pt. 601, App. C).

## II. Good Faith Reliance On The Advice Of Counsel Is A Defense To A Charge Of Willfully Violating The FCRA

Farmers has cited its reliance on counsel in formulating its FCRA notice as a defense to plaintiffs' claims that Farmers willfully violated the statute. The district courts, however, have struggled with the continued viability of this defense in light of the Ninth Circuit's ruling in *Reynolds*. In Farmers' case, the first two decisions the district court rendered after the initial *Reynolds* opinions rejected this defense outright. Although the district court subsequently permitted Farmers to assert this defense (following the Ninth Circuit's third and final decision now under review), it warned that "[t]he new opinion in *Reynolds* . . . leaves open the possibility, *albeit by a small margin*, that an insurer might be able to establish it did not act willfully in formulating an unlawful adverse action notice, if the formulation of the notice was based on advice of counsel." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006) (emphasis added).[8]

Good faith reliance on the advice of counsel should defeat a finding of willfulness. Past precedents of this Court hold that civil defendants may not be held liable for "willful" or "reckless" noncompliance if the defendant sought and followed counsel's advice. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 129-30 (1985). The Ninth Circuit's decision in *Reynolds* improperly negates this presumption and holds that advice of counsel is no longer sufficient to rebut willfulness. The court further clouded the continuing viability of an advice of counsel defense by explaining that

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[8] Given the impact of *Reynolds* and the similarity of the legal issues presented in the cases now under review, the court stayed the *Ashby* action pending this Court's disposition of this appeal. *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Oct. 30, 2006).

evidence of counsel's advice *may* be used to rebut "willfulness" only in "*some*" – but presumably not all – cases. *Reynolds*, 435 F.3d at 1099.

The court's proffered basis for refusing to hold that reliance on counsel negated "willfulness" was its concern that such a rule would "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* In so ruling, the Ninth Circuit improperly shifted the focus from the *defendant's* actions to the reasonableness of *counsel's* advice. *See id.* ("Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation."). The panel expressed its concern that allowing this defense to rebut "willfulness" would promote "creative lawyering." *Id.* It held that petitioners' interpretation of an issue of "first impression" – that an initial insurance charge to a new customer does not constitute an "increase in any charge for" insurance and thus does not represent an "adverse action" – was "implausible" and that reliance on counsel "[was] not dispositive" in such a circumstance. *Id.* at 1090, 1099. The panel then suggested that in "some" cases in which this defense is appropriate, "the testimony of the company's executives and counsel" is necessary to establish it. *Id.* at 1099.

The lower courts have been constrained by these sweeping statements from even allowing defendants (such as Farmers) to assert an advice of counsel defense. In fact, the same district court that decided the cases under review here warned that this defense survives *Reynolds* only "by a small margin . . . ." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006). This defense should not only be *permissible* in all cases, it should continue to serve as presumptive evidence of non-willfulness.

As a preliminary matter, this Court has already rejected a "more expansive" definition of willfulness that would hinge

on the "reasonableness" of the legal advice rendered, because this would "permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect [legal] assumption . . . ." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988).[9]

Further, this Court's prior decision in *Thurston* demonstrates that, as a matter of law, good faith reliance on the advice of counsel negates a finding of "willfulness." In that case, the Court adopted the "reckless disregard" standard of willfulness based on the legislative history of the ADEA. *Thurston*, 469 U.S. at 126. The Court held that the defendants' conduct was not "willful" under even a "reckless disregard" standard:

> TWA certainly did not "know" that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in "reckless disregard" of the Act's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA.

*Id.* at 129. The Court explained that after the amendments to the ADEA, "TWA officials met with their lawyers to determine whether the mandatory retirement policy violated the Act." *Id.* Although the defendants' statutory defense was "meritless" and they had "overlooked" a central legal issue, "[t]here simply [was] no evidence that TWA acted in 'reckless disregard' of the requirements of the ADEA." *Id.* at 124, 130.

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[9] Notably, the stakes here are raised considerably from the comparatively minor effect of a "willful" violation of the provision at issue in *McLaughlin* (an increase in the statute of limitations from two years to three years, *id.* at 129) to the large aggregated statutory and punitive damages that are available, even in the absence of actual injury, upon proof of a "willful" violation of the FCRA notice provisions at issue here.

In the complex regulatory environment governing American business, there will always be open questions as to the precise reach of a particular statute. Companies must be able to rely on qualified counsel to guide their actions – and not be put in peril of extraordinary damages because of *post hoc* determinations by federal courts in litigation. If the company and its counsel misconstrue the statute, the company may be liable under a negligence standard; but in no way can it be said to have "willfully" transgressed the statutory requirements. To the contrary, good faith reliance on the advice of counsel is powerful, if not dispositive, evidence that the company recognized that it is subject to regulatory requirements and has made a good faith effort to conform its conduct and policies to these requirements. As a result, a "willfulness" finding is inappropriate.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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November 13, 2006